No. 79-186

In the Supreme Court of the United States

OCTOBER TERM, 1978

BOGLEY, INC. AND ROBERT W. LEBLING, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 598 F. 2d 1323. The district court's memorandum and order denying petitioners' motion to dismiss (Pet. App. 30a-44a) is unreported.

JURISDICTION

The judgments of the court of appeals were entered on April 19, 1979. A petition for rehearing was denied on July 5, 1979 (Pet. App. 45a-46a). The petition for a writ of certiorari was filed on August 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the price-fixing activities of real estate brokers located in Montgomery County, Maryland, are

within the reach of the Sherman Act as activities "in restraint of trade or commerce among the several States * * *." 15 U.S.C. 1.

2. Whether the district court properly instructed the jury on the degree and nature of criminal intent necessary to support a conviction under Section 1 of the Sherman Act.

3. Whether the district court's instruction that evidence of good character may create a reasonable doubt of guilt was adequate.

STATEMENT

On April 1, 1977, a federal grand jury in Maryland charged six corporations and three individuals with violating Section 1 of the Sherman Act, 15 U.S.C. 1, by conspiring to raise real estate brokerage commission rates on the sale of homes in Montgomery County, Maryland, from six to seven percent. After a jury trial the defendants were convicted and sentenced to suspended prison terms and fines.[1] The court of appeals affirmed (Pet. App. 1a-29a).

1. Prior to September 1974, the prevailing real estate commission in Montgomery County, Maryland, was six percent (Pet. App. 3a). Although several of the defendants were dissatisfied with this rate and desired to raise it to

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[1]Petitioners are Bogley, Inc., and its president, Robert Lebling. Bogley was fined $15,000; Lebling was fined $5,000 and placed on probation for one year (J.A. 947, 949).

The two other individual defendants (John P. Foley, Jr., and Robert L. Gruen) and four of the other corporate defendants (Colquitt Carruthers, Inc., Jack Foley Realty, Inc., Robert L. Gruen, Inc., and Shannon & Luchs Co.) have filed separate petitions to review their convictions in this case. These petitions (Nos. 78-1737, 78-1838 and 79-93) are still pending.

seven percent, they feared that they would lose business to competitors who continued to charge six percent (*id.* at 13a). Defendant Foley, in particular, entertained this fear (J.A. 657).[2] Therefore, before raising his commission rates to seven percent, he invited executives of several of his largest competitors to a dinner at the Congressional Country Club to discuss "something of great importance to the real estate industry" (J.A. 126). Nine persons attended this dinner, including petitioner Lebling, the president of petitioner Bogley, Inc.[3] The "something of great importance" turned out to be a discussion of real estate commission rates and an agreement to raise them to seven percent.

Defendant Foley opened the discussion by announcing his intention to raise his rate to seven percent (Pet. App. 4a). The group then discussed the commission rate and, as defendant Shannon & Luchs' vice-president put it, "I wouldn't say that the comments were purely innocent" (J.A. 333). The several real estate executives questioned each other as to their intentions with regard to raising commission levels. Petitioner Lebling, as well as several other persons, stated that his firm would raise its commission rate to seven percent (J.A. 419, 493).

Following the dinner, the several realty firms raised their commission rates from six to seven percent for most—and in some cases essentially all—of their sales

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[2]"J.A." refers to the Joint Appendix in the court of appeals.

[3]Petitioner Lebling testified that he attended the meeting because he thought that Foley might need assistance in his upcoming presidency of the Montgomery County Board of Realtors, but he admitted that he had not been active in Board matters for a number of years prior to 1974 (J.A. 110, 641, 801-802; Pet. 6).

(Pet. App. 4a). Petitioner Lebling was particularly responsible for his firm's decision to raise its commission rate from six to seven percent.[4] Petitioner Bogley, Inc., which had taken no seven percent listings before September 1974, took 48 percent of its listings at seven percent in October 1974, 50 percent in November 1974 and 70 percent in December 1974 (J.A. 1054-1055; Pet. App. 16a-17a).

2. Petitioners moved to dismiss the indictment, contending that their activity was outside the scope of the Sherman Act because real estate sales are not in, and do not substantially affect, interstate commerce. The district court denied the motion, holding that petitioners' substantial involvement in interstate transactions and sales brings their conduct within the reach of the Sherman Act (Pet. App. 40a):

> [Petitioners] are * * * companies and businessmen who conduct multimillion dollar operations, who are located in a large expanding metropolitan area and whose services are used by buyers and sellers moving into and out of Maryland, who assist in arranging financing of residential properties sold with governmental and lending agencies outside of Maryland, who attract purchasers through the use of multistate referral services, and who advertise their brokerage business interstate.

The court of appeals upheld the denial of this motion. It noted that the record revealed that petitioners operate within "a substantial interstate market" (Pet. App. 11a) for real estate in the Washington, D.C. area, that

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[4]Petitioner Bogley's vice-president testified that petitioner Lebling personally raised the subject of increasing rates at the meeting of the Bogley board in late September 1974 (J.A. 688).

petitioners engaged in extensive interstate advertising of their services, attracted out-of-state buyers by participation in national relocation services and assisted buyers in obtaining out-of-state loans, and that a substantial portion of petitioners' sales involved persons moving into or out of the State (*id.* at 9a-12a).

ARGUMENT

1. Petitioners contend (Pet. 21-27) that their price-fixing activities fall outside the scope of the Sherman Act because real estate sales are not in, and do not substantially affect, interstate commerce. For the reasons stated in our brief in opposition to the petitions filed by petitioners' co-defendants (Br. in Opp. 5-6), that contention was properly rejected by both courts below and does not warrant further review.[5]

2. Petitioners incorporate by reference (Pet. 27) certain contentions raised by the petitions in Nos. 78-1737 and 78-1838. Our response to those contentions is contained in our brief in opposition to those petitions (Br. in Opp. 6-9).

3. Petitioner Lebling contends (Pet. 14-20) that the district court erred by instructing the jury as follows (J.A. 919):

> The circumstances may be such that evidence of good character creates a reasonable doubt of the Defendants' guilt, since you may determine and believe that it is improbable that a person of good character committed the crime charged.

Petitioner had sought the following instruction instead (Pet. 10) (emphasis supplied):

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[5]We are providing petitioners with a copy of our brief in opposition in Nos. 78-1737, 78-1838 and 79-93.

> The circumstances may be such that evidence of good character may *alone* create a reasonable doubt of the defendant's guilt, since you may determine it improbable that a person of good character would commit the crime charged.

The court of appeals correctly concluded that the omission of the word "alone" was not material and that the trial judge "gave substantially the charge requested" (Pet. App. 22a). The jury was amply informed that evidence of a defendant's good character could create a reasonable doubt of his guilt and could be cause for acquittal. Petitioner obviously preferred his formulation, but, where the substance of a requested charge is given, the refusal to use the very words sought by a defendant is not error. *United States* v. *Pritchard*, 458 F. 2d 1036, 1040 (7th Cir.), cert. denied, 407 U.S. 911 (1972). See also *United States* v. *Park*, 421 U.S. 658, 675 (1975).

Nonetheless, petitioner suggests (Pet. 14-15) that the court of appeals' decision is at odds with this Court's decisions in *Edgington* v. *United States*, 164 U.S. 361 (1896), and *Michelson* v. *United States*, 335 U.S. 469 (1948). Those decisions, however, do not hold that a defendant is entitled to have the word "alone" used in this charge. In *Edgington*, the Court held that a jury instruction was erroneous because it charged that evidence of good character could be considered only if the balance of the evidence was in conflict or there was doubt as to the defendant's guilt. The Court held that, if evidence of good character is relevant, it may be considered along with other evidence and may by itself create a reasonable doubt. 164 U.S. at 366. See *United States* v. *Haskell*, 327 F. 2d 281, 286 (2d Cir.), cert. denied, 377 U.S. 945 (1964). In *Michelson*, although the Court cited its prior decision in *Edgington* with approval

(335 U.S. at 476), the Court did not have before it any challenged jury instructions but ruled instead on the scope of permissible cross-examination of character witnesses. Neither *Edgington* nor *Michelson* suggests, much less holds, that omission of the word "alone" from a "good character" instruction is fatal when the instruction adequately informs the jury that good character evidence may be sufficient to create a reasonable doubt of guilt.[6]

Petitioner's assertion that the decision in this case conflicts with decisions in other circuits is insubstantial. As petitioner recognizes (Pet. 15), the court of appeals' decision is consistent with decisions in the First, Second, Fifth, Sixth, Eighth and Ninth Circuits.[7] The District of Columbia, Seventh and Tenth Circuits do not, as petitioners contend (*ibid.*), hold to the contrary. Neither the District of Columbia Circuit nor the Seventh Circuit has held that the word "alone" must be included in a "good character" instruction. See *Marzani* v. *United States*, 168 F. 2d 133, 138-139 (D.C. Cir.), aff'd on other grounds, 335 U.S. 895 (1948); *United States* v. *Donnelly*,

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[6]Petitioners' claim (Pet. 18) that *Michelson* "repudiated" the Fourth Circuit's decision in *Mannix* v. *United States*, 140 F. 2d 250 (4th Cir. 1944), is insubstantial. The Court in *Michelson* made clear that it was deferring to "accumulated judicial experience" and declining to change existing character evidence law (335 U.S. at 478, 487), and it twice cited *Mannix* with approval. *Id.* at 480 n.17, 482 n.20.

[7]*United States* v. *Lachmann*, 469 F. 2d 1043, 1046 & n.3 (1st Cir. 1972), cert. denied, 411 U.S. 931 (1973); *United States* v. *Fayette*, 388 F. 2d 728, 737 (2d Cir. 1968); *United States* v. *Callahan*, 588 F. 2d 1078, 1086 n.1 (5th Cir. 1979), pet. for cert. pending, No. 78-1561; *United States* v. *Brown*, 353 F. 2d 938, 939-940 (6th Cir. 1965); *Black* v. *United States*, 309 F. 2d 331, 343-344 (8th Cir. 1962), cert. denied, 372 U.S. 934 (1963); *Carbo* v. *United States*, 314 F. 2d 718, 746-747 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964).

179 F. 2d 227, 233 (7th Cir. 1950).[8] And the Tenth Circuit mandates the inclusion of the word "alone" in this instruction only in cases where the accused rests his defense solely on his good character. *Oertle* v. *United States*, 370 F. 2d 719, 726-727 (10th Cir. 1966), cert. denied, 387 U.S. 943 (1967). Petitioner admittedly (Pet. 19) did not make character his sole defense in this case.

Finally, petitioner contends that inclusion of the word "alone" in the instruction in this case is particularly crucial because he was convicted of a "white collar" crime (Pet. 16). But rules of law do not and should not distinguish between defendants on the basis of their social or economic status. Moreover, instructions like the one

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[8]In *United States* v. *Donnelly, supra*, the court held erroneous an instruction that merely indicated that character evidence should be considered along with other evidence but did not indicate that such evidence could create a reasonable doubt. The court stated that the district court should have instructed the jury that character evidence "may in itself be sufficient to create in the minds of the jury a reasonable doubt" (179 F. 2d at 233). The court, however, did not hold that any particular formulation of the charge was indispensable so long as the substance of the charge was conveyed to the jury.

Petitioners' reliance on *United States* v. *Lewis*, 482 F. 2d 632 (D.C. Cir. 1973), is misplaced. The court there did not hold that a defendant is entitled to inclusion of the word "alone" in the "good character" instruction. Rather, *Lewis*, like *Michelson*, concerned the permissible scope of cross-examination of a character witness. *Id.* at 634. The court in *Lewis* noted that good character evidence can create a reasonable doubt as to guilt. 482 F. 2d at 637. The court did not hold, however, that particular emphasis must be given to such evidence by the use of the word "alone" in the jury instruction.

given in this case have repeatedly been upheld by courts of appeals in cases involving "white collar" crime.[9]

CONCLUSION

The petition for a writ of certiorari should be denied. For the reasons stated on page 6 of our brief in opposition in *Foley* v. *United States*, Nos. 78-1737, 78-1838 and 79-93, however, the Court may wish to defer disposition of this petition pending the decision in *McLain* v. *Real Estate Board of New Orleans, Inc.*, cert. granted, No. 78-1501 (May 14, 1979).

Respectfully submitted.

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[9]See, *e.g.*, *United States* v. *Callahan*, *supra* (income tax evasion); *United States* v. *Lachmann*, *supra* (income tax violation); *United States* v. *Fayette*, *supra* (acceptance of improper political contribution); *United States* v. *Brown*, *supra* (mail fraud by corporate president); *Black* v. *United States*, *supra* (income tax invasion).

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